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6 **BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD**
7 **OF THE STATE OF CALIFORNIA**

8 In the Matter of the Application of:
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10 **Melinda Swanson, applicant on behalf of**

11 **A. A. (minor)**
12

Precedent Decision No. 01 - 10

13 A hearing on this application was held on September 11, 2001, in San Jose, California, by
14 Catherine Close, Hearing Officer, who was assigned to hear this matter by the Executive Officer of the
15 Victim Compensation and Government Claims Board (Board).

16 Martha Vickers, Victim Witness Advocate, attended the hearing on behalf of the minor.¹

17 The hearing was closed to the public under Government Code section 13963.1.

18 **Claim History**

19 The application alleged that A. A. was the victim of Penal Code 273a, child endangerment,
20 as the result of her mother's drug use during her pregnancy with A. The application was received on
21 February 6, 2001; recommended for denial on March 14, 2001, and a timely appeal was filed.

22 **Summary of Issues**

23 Staff recommended the denial of the application because staff determined that there was
24 insufficient evidence that A. A. was the victim of a qualifying crime.

25 **Findings of Fact**

26 The facts in this case appear to be undisputed:
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28 ¹ Applicant Melinda Swanson planned to attend the hearing but did not do so because county offices
29 were closed at midday due to the terrorist attacks on the east coast.

1. A. A. was born on October 15, 2000. A. and her mother tested positive for amphetamine and methamphetamine at the time of A.'s birth. A. was a premature baby, born at twenty to thirty weeks' gestation. She suffered respiratory distress, pervasive infection, one episode of apnea (breathing stopped), a small patent ductus arterios (a small opening in her heart), mild retinopathy of prematurity (blood vessels in the retina were not matured), jaundice and difficulty gaining weight.²

2. A. A.'s mother admitted having taken methamphetamine prior to coming to the hospital to give birth to A. Although she stated the use was "one-time," she had been referred to a prenatal substance abuse program which she did not attend and has a history of arrests for use of controlled substances.³

3. A. was hospitalized in the Neonatal Intensive Care Unit for 47 days. The mother failed to visit the child in the hospital. Her failure to regularly visit A. prevented the medical staff from being able to instruct the mother on the care of the child.⁴ The mother did not respond to pages from the intensive care unit social worker, refused to attend a substance abuse program, had no baby supplies or car seat, and made no plans for pediatric care.⁵

Determination of Issues

An application shall be granted if a preponderance of the evidence shows that as a direct result of a crime, the victim incurred an injury resulting in a pecuniary loss. (Gov. Code, § 13964(a).) The applicant has the burden of proving, by a preponderance of the evidence, all issues necessary to

² Jurisdiction/Disposition Report, Superior Court of California, County of Santa Clara, December 12, 2000; Leon Tan, M.D., Pediatric Neurology Inpatient Consultation, Santa Clara Valley Health and Hospital System, November 15, 2000.

³ Juvenile Dependency Petition, December 7, 2000, page 4; Jurisdiction/Disposition Report, Superior Court of California, County of Santa Clara, December 12, 2000;.

⁴ *Ibid.*

⁵ *Ibid.*

1 establish eligibility, including the elements of the qualifying crime. (Cal. Code Regs., tit. 2, §§ 647.32,
2 653.4.)⁶

3 The application as filed alleged that A. was a victim of Penal Code section 273a. It is a
4 violation of that statute to willfully cause or permit any child to suffer; or, having the care and custody
5 of any child, to willfully cause or permit that child to be placed in such situation that its person or
6 health is endangered. However, as acknowledged by Carol L. Jones, the deputy district attorney who
7 represented A. A. in the dependency proceedings, that statute does not address conduct directed at an
8 unborn child. (See also *Reyes v. Superior Court In and For San Bernardino County* (1977) 141
9 Cal.Rptr 912, 75 Cal.App.3d 214, which held that a mother who endangered a fetus by taking heroin
10 during her pregnancy, failing to seek prenatal care and giving birth to twins who were born addicted to
11 heroin and who suffered withdrawal symptoms could not be found guilty under Penal Code section
12 273a.) This application cannot be approved on the basis that A. A. is a victim of a violation of Penal
13 Code section 273a.

14 Our analysis does not end with a discussion of Penal Code section 273a, however. A. A.
15 may be eligible for the program if she is determined to be the victim of a qualifying crime, even if it is
16 not the crime for which the application was submitted. (*In re A. A.*, Precedent Decision 01-01.)

17 Health and Safety Code section 11377 penalizes possession of amphetamines and
18 methamphetamine. A. A.'s mother was in violation of that statute. She admitted to hospital personnel
19 that she had taken methamphetamine. Both she and A. A. tested positive for amphetamines and
20 methamphetamine at the time of A. A.'s birth.

21 A victim is defined under the Victim Compensation statute as one who sustains injury or
22 death as a direct result of a crime. (Gov. Code, § 13960(a)(1).) No evidence has been offered which
23 specifically states that A. A.'s health problems are a direct result of her mother's ingestion of illegal
24 drugs. In the letter cited above, Carol Jones stated that it is her opinion and, she believes, that of all
25 five of A.'s physicians, that she is a victim of her mother's crimes of possession and ingestion of
26 methamphetamine and amphetamines. The representative has submitted a number of articles,
27 including publications from the University of Chicago, the University of California at Davis, and the

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29 ⁶ All citations to regulations are to Title 2, California Code of Regulations.

1 National Institute of Health, which discuss the damage caused to a fetus by the mother's ingestion of
2 methamphetamine. This literature makes clear that a mother's ingestion of methamphetamine exposes
3 her fetus to a risk of physical injury. It is found that A. A. suffered a threat of physical injury from her
4 mother's violation of Health and Safety Code section 11377 and that she is an eligible victim of a
5 qualifying crime under the Victim Compensation Program.

6 A. is apparently requesting a "zero award" pursuant to Regulation section 649.22. That
7 regulation allows a victim to seek an initial determination of eligibility without regard to a specific
8 pecuniary loss. At the time of the application and hearing A. A.'s medical expenses are fully
9 reimbursed by MediCal and she has not received any mental health counseling.⁷ The representative
10 stated that some of the professional literature indicates that A. A. may require mental health counseling
11 when she is about five years old. As no evidence has been submitted at this time to connect A.'s
12 health problems to her mother's criminal conduct, any future requests for reimbursement of medical or
13 mental health counseling expenses must be supported by evidence that the need for those expenses is a
14 direct result of the qualifying crime.

15 Order

16 The application shall be allowed as a zero award.

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20 Date: October __, 2001

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CATHERINE A. CLOSE
Hearing Officer
Victim Compensation and Government
22 Claims Board
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29 ⁷ At the time of the hearing, A. A. was only eleven months old.

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15 On October 19, 2001, the California Victim Compensation and Government Claims Board
16 adopted the attached Proposed Decision of the Hearing Officer as its Decision in the above-referenced
17 matter. The Decision became effective on October 19, 2001.
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19 Date: October 29, 2001

20 JANICE HILL
21 Acting Chief Counsel
22 Victim Compensation and Government
23 Claims Board
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